

IN THE UNITED STATES DISTRICT COURT
for the
DISTRICT OF COLORADO

WESTERN ENERGY ALLIANCE, a Colorado, non-profit organization,

Plaintiff

v.

U.S. FISH AND WILDLIFE SERVICE, a federal agency within the United States
Department of the Interior,

Defendant.

Case No. _____

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COMPLAINT

COMES NOW, Plaintiff, WESTERN ENERGY ALLIANCE (“Western Energy”), by and through its attorneys, Holsinger Law, LLC and for its Complaint against the U.S. FISH AND WILDLIFE SERVICE (“FWS”) alleges as follows:

I. INTRODUCTION

1. Pursuant to the Freedom of Information Act, codified at 5 U.S.C. § 552 (as amended) (“FOIA”), Western Energy requested specific information from the FWS in a letter dated May 2, 2013 (“FOIA Request”). As of the date of this Complaint, the FWS has failed to adhere to FOIA’s requirements with respect to the FOIA Request.

2. This Complaint seeks, inter alia, an Order of the Court declaring that the FWS violated and continues to violate FOIA by failing to make a determination with respect to the FOIA Request, enjoining the FWS from illegally withholding information responsive to the Request, and compelling the FWS to release such information forthwith.

II. PARTIES

3. The Plaintiff, Western Energy, is a non-profit, regional trade organization formed under the laws of the State of Colorado. Western Energy’s headquarters are located at 410 17th Street, #700, Denver, Colorado 80202.

4. Western Energy represents more than 400 companies engaged in all aspects of environmentally responsible exploration and production of oil and

natural gas in the West. Western Energy brings this action on behalf of itself and its adversely affected members.

5. Many of Western Energy's members operate on federal lands and are therefore substantially and materially impacted by agency decisions relating to the use and regulation of such land.

6. Western Energy will make the information obtained from its FOIA Request available to its members and the general public and does not seek this information for commercial use.

7. The Defendant, the FWS, is a federal agency within the U.S. Department of the Interior. As a federal agency, the FWS is responsible for responding to FOIA requests submitted to it.

8. The FOIA Request was properly directed to the FWS because the FWS had (and has) possession and control over the information sought in the FOIA Request.

III. JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question).

10. Venue in this Court is proper under 5 U.S.C. § 552(a)(4)(B) as Western Energy's principal place of business is in Colorado.

11. Western Energy's administrative remedies have been constructively exhausted due to the FWS's failure to respond to the FOIA Request within the statutorily prescribed time period. 5 U.S.C. § 552(a)(6)(C).

12. Western Energy has standing to bring this case because it is injured by the FWS's failure to adhere to the requirements of FOIA with respect to its FOIA Request; the FWS caused Western Energy's injury because it is responsible for failing to adhere to FOIA; and the relief requested herein can redress Western Energy's injury.

IV. GENERAL ALLEGATIONS

13. On May 2, 2013, Western Energy properly submitted its FOIA Request to the FWS. A copy of Western Energy's FOIA Request is attached hereto as EXHIBIT A.

14. The FOIA Request was submitted on behalf of Western Energy by Ms. Kathleen Sgamma, Vice President of Government and Public Affairs for Western Energy.

15. The FOIA Request sought information regarding how peer review was conducted on a report entitled "Greater Sage-Grouse (*Centrocercus urophasianus*) Conservation Objectives Final Team Report" dated February 2013 ("COT Report").

16. The COT Report is a highly influential report synthesizing extensive research and delineating conservation objectives with respect to greater sage-grouse

assembled by a team of experts that was, and is, heavily relied upon by the FWS in its decision-making with respect to the greater sage-grouse.

17. The COT Report is the product of a team of experts convened by the FWS in an effort to assist other land management agencies, such as the Bureau of Land Management and the United States Forest Service, in their land use planning relating to the greater sage-grouse.

18. Accordingly, Western Energy has an interest in how the COT Report was created, including how peer review was conducted, and will use such information to inform its members and the general public about the management of public lands.

19. The information requested by Western Energy in its FOIA Request has never been made available to the public.

20. As of June 14, 2013, Western Energy had received no acknowledgement, response, or other communication from the FWS with respect to its FOIA Request.

21. Accordingly, on June 14, 2013, Western Energy sent a second letter to the FWS, reiterating its FOIA Request and reminding the FWS of its obligations under FOIA with respect to the request ("Follow-up Request"). A copy of Western Energy's Follow-up Request is attached hereto as EXHIBIT B.

22. On June 18, 2013 the FWS acknowledged that it received the FOIA Request and the Follow-up Request (“Notice of Receipt”). A copy of the FWS’s Notice of Receipt is attached hereto as EXHIBIT C.

23. As of the date of this Complaint, Western Energy has received no further communication, written, electronic, or otherwise, from the FWS regarding its FOIA Request or its Follow-up Request.

24. Pursuant to FOIA, a federal agency is required to

determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination.

5 U.S.C. § 552(a)(6)(C).

25. Pursuant to 5 U.S.C. § 552(a)(6)(C), the FWS’s mandatory determination deadline to the FOIA Request could possibly be calculated in a number of ways:

a. If the date of submission of the FOIA Request began the twenty (20) day period, then the mandatory determination and response deadline was on or about May 30, 2013;

b. If the date of submission of the Follow-up Request began the twenty (20) day period, then the mandatory determination and response deadline was on or about July 12, 2013; or

c. If the date of the FWS's Notice of Receipt began the twenty (20) day period, then the mandatory determination and response deadline was on or about July 16, 2013.

26. Thus, regardless of the method used to calculate the FWS's mandatory determination and response deadline, the FWS has failed to timely make such determination and respond to the FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C).

27. As of the date of this Complaint, the FWS has made no request for extension, assertion of unusual circumstances, or claim that that the information requested by the FOIA Request is exempt from release or subject to withholding for any other reason.

V. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of FOIA for Failing Make Timely Determination

28. The allegations of paragraphs 1 – 27 are incorporated by references as though fully set forth herein.

29. The FOIA Request is lawful and complete.

30. The FWS has violated FOIA by failing to meet its mandatory determination and response deadline pursuant to 5 U.S.C. § 552(a)(6)(C) with respect to the FOIA Request.

31. The FWS continues to violate FOIA by failing make a determination and respond to the FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C).

32. Western Energy is entitled to an order declaring that the FWS violated and continues to violate FOIA by failing to make a determination and respond to the FOIA Request.

SECOND CLAIM FOR RELIEF

Violation of FOIA by Illegally Withholding Agency Records

33. The allegations of paragraphs 1 – 32 are incorporated by references as though fully set forth herein.

34. The FWS has violated FOIA by illegally withholding information responsive to the FOIA Request.

35. The FWS continues to violate FOIA by illegally withholding information responsive to the FOIA Request.

36. Western Energy is entitled to an order declaring that the FWS has violated FOIA by illegally withholding information responsive to the FOIA Request, enjoining the FWS from continuing to withhold such information, and compelling the FWS to release information responsive to the FOIA Request to Western Energy forthwith.

VI. PRAYER FOR RELIEF

WHEREFORE, Western Energy prays that the Court enter the following relief on behalf of Western Energy as against the FWS:

A. A declaration that Western Energy has exhausted its administrative remedies with respect to the FOIA Request based on the FWS's failure to comply with the deadlines set forth in FOIA;

B. A declaration that the FWS violated and continues to violate FOIA by failing to make a determination and respond to the FOIA Request;

C. A declaration that the FWS violated and continues to violate FOIA by illegally withholding information that is responsive to the FOIA Request;

D. An order enjoining the FWS from illegally withholding information responsive to the FOIA Request;

E. An order compelling the FWS to produce the illegally withheld information responsive to the FOIA Request to Western Energy forthwith;

F. An order granting Western Energy their costs of litigation, including reasonable attorney fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E); and

G. Such other and further relief as the Court may deem just and equitable.

Dated October 15, 2013.

Respectfully Submitted,

HOLSINGER LAW, LLC

Original on file at Holsinger Law, LLC

By: /s/ Kent Holsinger

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CERTIFICATE OF SERVICE

Pursuant to D.C.COLO.LCivR 5.1(G), I hereby certify that on October 15, 2013, I electronically filed the foregoing with the Clerk of the Court via the Electronic Case Filing System; as part the initiating filing, no parties were served thereby.

HOLSINGER LAW, LLC

By: /s/ Luci Stremme

Luci Stremme, Paralegal